

Message Text

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C O N F I D E N T I A L NAIROBI 6295

E.O. 11652: GDS
TAGS: EINV, KE
SUBJECT: SAUL CASE

REF: STATE 080129

1. SUMMARY: IN REPLY REFTEL'S QUESTION ABOUT KENYAN JUDICIAL PROCEEDINGS, JUDICIARY IS INDEPENDENT BUT SLOW. EMBASSY NOW DOUBTS SAUL CASE WILL GO TO HIGH COURT BECUASE OF POSSIBLE EMBARRASSMENT TO MEMBERS PRESIDENT KENYATTA'S FAMILY. FOR HIS PART, SAUL DOES NOT FAVOR HIGH COURT AS SOLUTION BECAUSE, ACCORDING HIS LAWYER, HE QUESTIONS WHETHER HE CAN WIN ON TECHNICAL GROUNDS. PROSPECTS FOR MUTUAL ACCEPTANCE HIGH COURT SOLUTION APPLY EQUALLY TO ARBITRATION UNDER CONVENTION FOR SETTLEMENT OF INVESTMENT DISPUTES. ENCOURAGING DEVELOPMENTS ARE THAT KENYA GOVERNMENT OFFICIAL MAY MEET WITH SAUL IN EUROPE THIS WEEK, AND GOVERNMENT MAY AUTHORIZE SAUL TO EXPORT 24 TONS UNSORTED MINERAL ORE STORED IN KENYA. END SUMMARY.

2. REFTEL REQUESTED OPINION ON HIGH COURT. AS WITH MANY JUDICIARIES, INEFFICIENCIES AND DELAYS APPLY, BUT HIGH COURT WIDELY HELD TO BE INDEPENDENT. IN SAUL'S CASE, CONSTITUTIONAL PROVISION WOULD REQUIRE HEARING BY CHEIF JUSTICE HIMSELF AS WELL AS ONE OTHER JUSTICE,
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THUS PRODUCING SPEEDIER JUDGMENT. SAUL'S LAWYER, MICHAEL ARONSON, POINTED OUT THAT SAUL WOULD NOT HAVE TO COME TO KENYA FOR FAIR TREATMENT. COURT COULD TAKE EVIDENCE IN EUROPE.

3. ARONSON SAID REASON WHY SAUL AGAINST GOING HIGH COURT ROUTE IS THAT HE DOES NOT THINK HE CAN WIN.

THOUGH CONSTITUTION (CHAPER V, SECTION 75) PROVIDES COMPENSATION FOR PROPERTY COMPLUSORILY ACQUIRED BY GOVERNMENT, SAUL AND ARONSON FEAR GOVERNMENT WILL SAY PRIVATE PERSON (CRITICOS), NOT GOVERNMENT, ACQUIRED PROPERTY THROUGH FORCE. CRITICOS INVADED PROPERTY FOR THREE MONTHS, THEN WAS EXPELLED BY GOVERNMENT, WHICH TOOK POSSESSION. MOREOVER, SAUL HAD ONLY MINING RIGHT RENEWABLE FROM YEAR TO YEAR. SAUL'S CLAIM, THEREFORE, MIGHT BE RESTRICTED TO BALANCE OF WHATEVER YEAR IN FORCE. IN CALCULATING FIGURE FOR ESTIMATED FUTURE EARNINGS, KENYA GOVERNMENT MIGHT CONTEND IT WOULD NOT HAVE RENEWED LICENSE. TECHNICALLY, GOVERNMENT COULD ALSO RAISE POINT THAT SINCE MINE LOCATED IN SOVEREIGN NATIONAL PARK, SAUL SHOULD INITIALLY HAVE BEEN AUTHORIZED ONLY TO PROSPECT, NOT ACTUALLY MINE. ARONSON CHARACTERIZED THESE POINTS AS HAIR-SPLITTING IN TERMS EQUITY, BUT SAUL MIGHT HAVE TO CONTEND WITH THEM.

4. ARONSON BELIEVES SAUL COULD BRING ACTION AGAINST GOVERNMENT FOR NOT HAVING PREVENTED CRITICOS FROM MOVING ONTO PROPERTY.

5. PROVATELY, ATTORNEY GENERAL NOT VERY INTERESTED IN SEEING CASE GO TO HIGH COURT BECUASE OF POSSIBLE EMBARRASSEMENT TO MEMBERS PRESIDENT'S FAMILY INVOLVED WITH CRITICOS. FOR ALL REASONS DESCRIBED ABOVE, DISPUTANTS WOULD BE EQUALLY RELUCTANT ACCEPT ARBITRATION UNDER CONVENTION FOR SETTLEMENT INVESTMENT DISPUTES (ARBITRATION-CONCILIATION AFFILIATE OF WORLD BANK).
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6. EMBASSY WILL CONTINUE PURSUE NEGOTIATED OUTCOME. THOUGH DELAYS WILL PERSISTS, CURRENT SIGNALS ARE NOT UNPROMISING: (1) J.H. OMINO, PERMSEC, MINISTRY NATURAL RESOURCES, NOW IN GENEVA, HAS AGREED MEET WITH SAUL THIS WEEK IN EUROPE; (2) ATTORNEY GENERAL CHARLES NJONJO HAS AGAIN WRITTEN TO GEOFFREY KARIITHI, PERMSEC, OFFICE OF PRESIDENT, REQUESTING INTER-AGENCY MEETING ON SAUL; KARIITHI HAS NOT YET RESPONDED; EMBASSY WILL ATTEMPT STIMULATE RESPONSE; (3) ACCORING ARONSON, OMINO HAS AGREED AUTHORIZE EXPORT PERMIT ALLOWING SAUL EXPORT 24 TONS UNSORTED MINERAL ORE HE HAS STORED IN KENYA. ARONSON SAID OMINO CAN LEGALLY DO THIS BUT SURPRISED OMINO WOULD WISH DO SO PRIOR REACHING OVERALL SETTLEMENT. ORE WORTH \$400,000 ACCORDING WOODTLE REPORT, BUT THIS MUST BE VERY ROUGH FIGURE.
LINDSTROM

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